

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL J. GLYN)	
Claimant)	
)	
VS.)	
)	
JE DUNN CONSTRUCTION CO.)	
Respondent)	Docket No. 1,051,284
)	
AND)	
)	
MIDWEST BUILDERS CAS. MUTUAL CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier request review of the December 20, 2010 Preliminary Hearing Order entered by Administrative Law Judge Rebecca A. Sanders.

ISSUES

It was undisputed claimant suffered a work-related back injury on July 15, 2009, while working for respondent. Claimant was provided medical treatment and released to return to work. While at work for a new employer, claimant bent over and had an onset of severe back pain which resulted in an emergency room visit. Claimant requested additional treatment from respondent but such treatment was denied as not related to the July 15, 2009 accidental injury and instead the result of a new intervening accident.

The Administrative Law Judge (ALJ) found claimant did not sustain a new accidental injury and therefore ordered respondent to provide medical treatment. The ALJ noted in pertinent part:

Claimant's current complaints are the natural and probable consequence of July 15, 2009. Claimant has not reached maximum medical improvement from his accidental injury of July 15, 2009. There is no evidence of a new injury or an aggravation.¹

Respondent requests review of the following: (1) whether the ALJ exceeded her jurisdiction in awarding benefits; and, (2) whether Mr. Glyn suffered an accidental injury

¹ ALJ Order (Dec. 20, 2010) at 1.

with his new employer for which the medical treatment is being requested. Respondent argues that claimant suffered a new accident in August 2010 while working for a different employer and therefore respondent is not liable for the resulting medical treatment.

Claimant argues the Board does not have jurisdiction to review this matter and therefore respondent's application for review should be dismissed. In the alternative, claimant argues the ALJ's Preliminary Hearing Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Initially, claimant maintains the Board does not have the jurisdiction to review the Preliminary Hearing Order. K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.²

A contention that the ALJ has erred in his finding that the evidence showed a need for medical treatment is not an argument the Board has jurisdiction to consider. And a contention that the ALJ erred in finding the evidence established claimant is entitled to temporary total disability compensation is not an argument the Board has jurisdiction to consider. K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary total disability compensation.

But in this instance, the issue raised was whether claimant's current condition and need for medical treatment was caused by the work-related accidental injury. The

² See K.S.A. 44-551.

undersigned Board Member concludes the Board does have jurisdiction to review the preliminary hearing issue of whether an injured worker's symptoms stem from the work-related accident as that issue is, in essence, tantamount to whether a worker has sustained an injury that arises out of and in the course of employment.

Michael Glyn was working for JE Dunn on July 15, 2009, when he sustained an injury and described it as follows:

I was working for JE Dunn here at the capital. We were moving large quantities of concrete and grout from outside into the building. We had 750 pounds of materials on a flat cart. Another laborer and I were -- had loaded it up and were trying to move it into the building. He took a bit of a running start to get up a ramp and couldn't push it all the way up the ramp. I was holding the door and moved down to grab the bottom lip of the flat cart and started pulling up. And when we reached the top of the ramp, I felt a twinge, if you will, in my lower back. Told the supervisor what had happened and decided to wait to decide whether or not we would report the injury. And the pain level intensified quite a bit in an hour or so and that's when we reported the accident and they took me to the hospital.³

The emergency room physician ordered physical therapy for two weeks and then later referred claimant for more intensive rehabilitation.

Dr. Joseph Galate was authorized as claimant's treating physician. Dr. Galate prescribed a muscle relaxer, pain medication, physical therapy and steroid injections. The last time claimant saw Dr. Galate was December 11, 2009. The last day claimant worked for respondent was January 19, 2010. Claimant ran out of pain medication and returned to see Dr. Galate on March 18, 2010. The doctor provided claimant with a one-month prescription of pain medication but told claimant that visit would be the last time he would see claimant as the doctor did not think claimant's injury was as severe as claimant was leading on.

Claimant returned to work in April 2010 for CDI, a mechanical contractor. He worked five weeks cleaning up construction "messes" using a golf cart. Claimant testified that the heaviest item he ever lifted was a 40-pound trash bag. Claimant was laid off and didn't return until early August. At the time of the preliminary hearing, claimant was working for a concrete construction company.

On October 20, 2009, claimant sought a second opinion with Dr. Charles Striebinger regarding his back pain. Claimant testified:

³ P.H. Trans. at 8-9.

I have good days and bad days, Your Honor. Some days I wake up and I feel for the most part good and there are days when I literally roll out of bed and I can hardly walk. There is days when it takes me ten minutes to put on a pair of socks.⁴

He further testified:

Q. How was when you were laid off versus when you're working? Which one is worse and which one is better in your opinion on your back?

A. Seems like I have more frequent bad days when I'm laid off. Keeping mobile, moving around seems to keep the pain at a less intense level, but it's on any given day it's hard to say.

Q. And how about these exacerbations that have occurred since July 15th, 2009, has your pain ever escalated and stayed there or not?

A. Yes, but not for any lengthy period of time.⁵

On cross-examination, claimant testified he performed a functional capacity evaluation before being released by Dr. Galate to return to work. Claimant did not receive any medical treatment from March 18, 2010, until the last week in August 2010.

Claimant testified he aggravated his back when he bent over with a two-pound steel pin in his hand which caused his back to go out. Claimant had to seek medical treatment at Jayhawk Primary Care. But he testified that if he would have not sought treatment if he would have had pain medication available to take.

Q. But you've not filed a worker's compensation claim for a new injury occurring against Amino Brothers, have you?

A. I don't think there's a new injury. So, no, I have not. I don't feel the need to because my pain level has never --⁶

Claimant did not believe he had suffered a new injury because even though released from medical care he did not feel the pain ever went away and his back has never been right.

Dr. John Pazell examined and evaluated claimant on October 12, 2010. The doctor diagnosed claimant with an annulus tear at L3-4 with discogenic abnormality with disk

⁴ P.H. Trans. at 18.

⁵ *Id.* at 22.

⁶ *Id.* at 34.

bulging and abnormality at L3-4, L4-5 and L5-S1 depending on the terminology employed. Dr. Pazell opined claimant's current need for medical treatment was the direct and proximate cause of his accidental injury on July 15, 2009.

Based upon the record compiled to date, this Board member finds claimant has met his burden of proof to establish that his current need for medical treatment is due to his July 15, 2009 accidental injury and the ALJ's Preliminary Hearing Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁸

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Rebecca A. Sanders dated December 20, 2010, is affirmed.

IT IS SO ORDERED.

Dated this 31st day of March, 2011.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Daniel L. Doyle, Attorney for Claimant
C. Anderson Russell Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge

⁷ K.S.A. 44-534a.

⁸ K.S.A. 2010 Supp. 44-555c(k).